IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5342

JAMES WINTFORED REWIS and
MARY LEE WILLIAMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

The government, in its brief, (U.S. Br. 13) compares the decisions under the mail fraud statute, 18 U.S.C. 1341, and Mann Act, 18 U.S.C. 2422, to the facts in this case under the Travel Act and offers them for analogous interpretation.

The government reasons that because the victim of a mail fraud scheme can supply the necessary "mailing" to bring the schemer within the federal statute, that a bettor or player in a gambling operation can supply the interstate

"travel" element to sustain a conviction under the Travel Act. The analogies are not valid because the wording of the statutes are substantially different. In the mail fraud statute Congress proscribed *all mailing* "for the purpose of executing such scheme or artifice". Thus, the victim may in fact supply the missing "mailing" element to confer federal jurisdiction if the mailings were "a part of the execution of the fraud", *Kann v. United States,* 323, U.S. 88,95, 89 L.ed. 88, 96, 65 S.Ct. 148, 157 A.L.R. 406; or, were incident to an essential part of the scheme", *Pereira v. United States,* 347 U.S. 1, 8, 98 L.ed 435, 444, 74 S.Ct. 358. The Travel Act does not proscribe *all travel* in interstate commerce which results in any gambling participation, it proscribes only that travel with intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of" the unlawful activity. The Opinion of the Fifth Circuit in this case acknowledged that the players or bettors were not covered by the statute and the government has not taken a different position here. For the government's analogy to be valid the Travel Act would have had to proscribe all interstate travel for the purpose of gambling just as the mail fraud statute proscribes all mailings for the purpose of executing the fraudulent scheme.

The attempt to analogize the Mann Act to the Travel Act must also fail. That Act, 18 U.S.C. 2422, attaches criminality to "Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce * * *" for prostitution. Here the language of the statute clearly and concisely proscribes a type of conduct which the government contends the Congress intended to proscribe in the Travel Act. Actually a comparison of the two statutes gives force to the petitioners' argument that Congress did not intend the Travel Act to apply under the circumstances of this case. "When Congress has the will, it has no difficulty in expressing it * * *. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambi-

guity should be resolved in favor of lenity * * *". *Bell v. United States*, 358 U.S. 169, 3 L.ed 2d 199, 79 S.Ct. 209 (1958).

The government urges the adoption of a "bringing about" test (U.S. Br. 15) to apply to the "attraction" theory contained in the Fifth Circuit Opinion in this case. The government asserts, "But it is another matter when it is reasonably foreseeable that customers will undertake interstate travel for the specific purpose of patronizing the illegal enterprise." (U.S. Br. 15). Even if this theory could be read into the Congressional Act, the pragmatic difficulties in applying it (by juries as well as courts) make it "reasonably foreseeable" that it would not work. When an interstate traveler goes to Miami, San Francisco, Chicago, New York, or any other place, how can a judge or jury say that his purpose was to participate in an unlawful activity and not to take a vacation or attend a convention?

The letter in the Congressional Record from Senator McClelland and Representative Harris (Pet. Br. 14) and the Attorney General's reply (Pet. Br. 15) make it clear that an interstate traveler who responds to advertising to supper clubs and business activities which provide shows, dining, dancing, and other entertainment as well as illegal gambling activities, is not intended to bestow federal criminal jurisdiction upon the operator of the business establishment. What jury or judge could discern whether or not the traveler's specific purpose was to gamble, or to enjoy the legal activities set up to induce the travelers to come and gamble?

When all is said, however, we must still look to the facts of this case. Here the only "attraction" which petitioners offered to interstate travelers was the proximity of their illegal enterprise to the State border—fifteen miles on a side road on the highway between Jacksonville and Fernandina. To apply the government's theory to the facts of this case

would broaden federal criminal jurisdiction beyond the intent of the Congress.

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